



POLICE DEPARTMENT

August 5, 2021

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In the Matter of the Charges and Specifications :

- against - :

Police Officer Edwin Duran :

Tax Registry No. 952700 :

Criminal Intelligence Section :

Case No.

2019-21351

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Ayisha Amjad, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer Edwin Duran, on or about November 14, 2019, while on-duty and assigned to the Intelligence Division, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Said Police Officer utilized excessive force against an individual known to the Department, by punching and kicking the individual.

P.G. 203-10, Page 1, Paragraph 5

P.G. 221-01

P.G. 221-02

PUBLIC CONTACT –
PROHIBITED CONDUCT
FORCE GUIDELINES
USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 22, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Deputy Inspector Joseph Profeta as its sole witness. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty, and recommend a penalty of the forfeiture of five (5) penalty days.

ANALYSIS

On November 14, 2019, Respondent and his assigned partners, Officers Delacruz and Delgado, used force to apprehend an individual (hereinafter "the arrestee") after an anonymous 911 call was received reporting a man breaking windows. The force used by Respondent during the arrestee's apprehension is not in dispute. The sole issue presented by the parties for resolution by this Tribunal is whether Respondent's use of force was excessive. For the reasons set forth below, I find that it was.

This matter was brought to the Department's attention based on surveillance video (Dept. Ex. 1). The arrestee did not testify and no complaint or other formal statements of the arrestee were entered into evidence. The sole eyewitness to testify was Respondent. While the Department called a witness from the Internal Affairs Bureau ("IAB") to testify to the factors used by IAB in its determination that Respondent's use of force was excessive, the Department admitted that it was not seeking to qualify the witness as an expert witness (Tr. 5); therefore, the witness's opinions as to the propriety of Respondent's use of force were not relied upon by the Tribunal.¹

The surveillance video was entered into evidence without objection. The video portrays an area of Church Avenue in the vicinity of East 37th Street in Brooklyn, NY, on November 14, 2019 (Tr. 7, 29-30, 51-52, 68). Both parties stipulated at trial to the identities of the relevant individuals captured in the video (Tr. 31-33, 71-76). The surveillance video depicts the following events:

- 02:02:33: Officer Delacruz is seen running after the arrestee in a roadway. The arrestee is tall and skinny, and Officer Delacruz is stout and substantially shorter than the arrestee.
- 02:02:34: Officer Delacruz grabs the arrestee with both arms around his waist. They twirl around in a circle before Officer Delacruz takes the arrestee down to the ground in the middle of street.
- 02:02:37: The arrestee lands on the ground lying on the left side of his body. Officer Delacruz positions himself on top of the arrestee, straddling him. The arrestee moves to his back, swinging his right arm towards Officer Delacruz's face.

¹ Deputy Inspector Joseph Profeta, the Commanding Officer of IAB Group 54, testified to the factors that he ordinarily takes into consideration when reviewing allegations of excessive force, including: (1) the officer's command and the type of crime to which the officer is responding, (2) video footage, if any, (3) the perpetrator's actions, including if the individual actively resisted arrest, and (4) how an officer with "reasonable training" would react in the situation (Tr. 25, 27). Deputy Inspector Profeta opined that the "drop kick" Respondent deployed when he first arrived to the scene was "like a wrestling move" and he believed it to be excessive since the arrestee's "legs weren't moving, and at the time . . . the officers had his hands under control" (Tr. 39, 41-44). He also opined that the hand strike deployed by Respondent with a Department radio in-hand was not consistent with the proper use of force (Tr. 56-57).

- 02:02:38: Officer Delacruz grabs the arrestee's arms. The arrestee flails his arms and struggles with Officer Delacruz.
- 02:02:41: Officer Delgado, a tall and bulky officer, is seen running toward where Officer Delacruz is struggling with the arrestee on the ground.
- 02:02:43: Officer Delgado positions himself on the arrestee's right side, and grabs the arrestee's right arm. The arrestee remains on his back.
- 02:02:45: Respondent, a short and skinny officer, is seen running toward Officers Delacruz and Delgado. As Respondent approaches the arrestee, he jumps in the air, landing with his right foot in a stomping motion on the arrestee's right leg and landing his left foot on the ground.
- 02:02:48: While Officers Delacruz and Delgado focus on the arrestee's upper body, Respondent pushes off Officer Delacruz's back, causing Officer Delacruz to move forward and, while holding his Department radio in his right hand, swings his right hand down, striking the arrestee in his left leg. Respondent's radio flies out of his hand onto the roadway.
- 02:02:51: Without retrieving his radio, Respondent moves to the arrestee's head and upper body area. Officer Delgado disengages from the arrestee and moves toward the arrestee's feet. Officer Delacruz moves from the arrestee's left side to the arrestee's right side and holds the arrestee's right hand on the ground. Respondent uses his right hand to strike the arrestee five times in a downward punching motion. The arrestee remains on his back during these events.
- 02:02:56: Respondent, Officer Delacruz, and Officer Delgado, are holding the arrestee's body down on the ground.
- 02:02:58: Two additional officers arrive to assist the officers.
- 02:03:02: Respondent appears to strike the arrestee's left upper body in a downward punching motion, but because of the distance of the camera and poor lighting conditions it is unclear where the strike lands.
- 02:03:04: Officer Delacruz releases his hold on the arrestee, stands up, and kicks the arrestee's upper body on his right side. Officer Delgado and one of the backup officers hold the arrestee's legs and flip him over so that the arrestee is lying on his stomach.
- 02:03:12: An RMP arrives on scene. Two officers exit their vehicle and proceed to direct traffic around the five officers. The arrestee remains on his stomach.
- 02:03:37: One of the backup officers retrieves Respondent's Department radio from the roadway. The arrestee remains on his stomach.

02:03:55: One of the backup officers appears to handcuff the arrestee.

02:04:04: The arrestee remains on his stomach. End of video.

(Dept. Ex. 1).

Respondent testified that on November 14, 2019, he was working at the 67 Precinct as a Field Intelligence Officer. His plainclothes assignment that day involved patrolling “violent gang areas” within the confines of the 67 Precinct. At approximately 2:00 a.m., Respondent received a radio transmission of a “10-39,” crime in progress, in connection with “a male breaking windows,” in the vicinity of East 37th Street between Church Avenue and Snyder Avenue in Brooklyn. He arrived to the location of the radio transmission a few minutes later and observed his partners, Officers Delacruz and Delgado, jump out of their vehicle and run toward Church Avenue. Respondent then jumped out as well and ran after his partners. He stated that he transmitted over the radio the description of a very tall, black male, wearing a hooded jacket, running on Church Avenue, who he observed from approximately 20 to 30 feet away. (Tr. 64-69, 83-85)

Respondent testified that, while he was running, he observed Officer Delacruz catch up to the arrestee and take him to the ground. Respondent stated that Officer Delacruz and he “are about 5’5,” 5’6.” Respondent observed the arrestee attempt a backhanded swing with his arm toward Officer Delacruz. Respondent stated that as he was approaching Officer Delacruz from approximately 10 to 20 feet away, he observed “the very top of [the arrestee’s] knuckles and finger” holding on to the collar of his partner’s shirt. Respondent believed Officer Delacruz and the arrestee were “struggling back and forth” due to the collar hold. Officer Delgado, a large male, approximately “6’4,” arrived next to attempt to assist Officer Delacruz. Respondent explained that in response to the arrestee “actively resisting [and] holding on to my partner” and

to “gain [his] compliance,” “I kicked him in the knee and thigh.” Respondent then delivered “a hand strike holding [his] Department radio.” Respondent noted, however, that his hand, not his Department radio, made contact with the arrestee. (Tr. 69-70, 73-74, 76-79, 86, 88-89, 92-94)

Respondent testified that the arrestee continued actively resisting arrest by not giving up his arms, flailing his arms, and not complying with their orders. The arrestee had placed his hands on the concrete and was attempting to push himself up off the ground to stand. Respondent proceeded to move to the top of the arrestee’s body and deliver approximately “three to five” hand strikes to the arrestee’s “face area and the upper body area,” attempting to gain compliance so that his partner could handcuff him. Respondent stated that after these strikes were delivered, he and the other officers were able to gain control of the arrestee. Additional officers arrived at the location, and, collectively, they were able to grab the arrestee’s arms and place him under arrest. (Tr. 78-80)

The arrestee refused medical treatment on the night of the incident. Respondent stated that he did not notice any injuries on the arrestee when he was placed under arrest at the scene; he only noticed that the arrestee had “bloody knuckles” at the precinct. Respondent testified that the arrestee told him that Respondent’s hits did not have any effect on him. (Tr. 80-81, 111-112, 114-115)

Respondent testified that, approximately a week after the incident occurred, he was suspended. The next day, however, Respondent’s suspension was “reversed,” and he was placed on modified assignment for approximately nine months. Accordingly, Respondent’s suspension lasted one day. (Tr. 81-82)

On cross-examination, Respondent acknowledged that he “could have done many things differently” regarding the incident. Respondent, however, was adamant in his belief that, at the time, he “used the amount of force necessary.” He admitted that, in hindsight, it would have

made sense to grab the arrestee's hand or arms that were holding onto Officer Delacruz, "but it still does not amount to excessive force." (Tr. 94-95, 98)

As charged, the Tribunal is tasked with assessing the propriety of the following uses of force by Respondent: (1) a running jump in which Respondent's right leg descends in a stomping motion on the arrestee's right leg, (2) a hand strike with Respondent's right hand while palming a Department radio, hitting the arrestee in the left leg, and (3) five punches to the arrestee's head and upper body.² Summarizing Patrol Guide procedure 221-01, the Department's Disciplinary System Penalty Guidelines ("Disciplinary Guidelines") states:

Force may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody. The reasonableness of the use of force is based upon the totality of the circumstances known by the member of the service at the time of the use of force. The Department assesses the reasonableness of force viewed from the perspective of a member with similar training and experience placed into the same circumstances as the incident under investigation. If the force used is unreasonable under the circumstances, it will be deemed excessive and in violation of Department policy.

Patrol Guide procedure 221-02 further states: "When a member of the service must gain compliance, control, or custody of an uncooperative subject, the member should comply with P.G. 221-01," and "[a]pply no more than the reasonable force necessary to gain control."

It is undisputed, as Respondent testified, that the arrestee was resisting arrest. Where an arrestee is acting in a non-compliant manner and placing officer safety at risk, use of force reasonably necessary to gain compliance is authorized (P.G. 221-01). The degree of force that is authorized is fact dependent and relies upon a determination of the facts known to the officer at the time the enforcement action is being taken. Ultimately, the propriety of the use of force requires a reasonableness determination to be made from the perspective of a reasonable officer

² Following this force, Respondent is later depicted on video deploying a hand strike in or about the arrestee's left shoulder (Dept. Ex. 1 at 02:03:02). This force is not charged and was not mentioned at trial. The Tribunal makes no finding as to the reasonableness of this use of force.

with similar training and experience operating under the same circumstances. Insights and knowledge gained only with the benefit of hindsight are not relevant to an excessive force analysis (*Graham v Connor*, 490 US 386, 396 [1989] [“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”])).

Based upon a review of Respondent’s testimony, in connection with a careful review of the video evidence, I find that Respondent’s use of force was more likely than not excessive under the totality of the circumstances. Respondent immediately delivered a barrage of force, including stomping and striking the arrestee’s legs and punching him five times in the face and upper body, without first making attempts to assist his partners in gaining control of the arrestee’s body to turn him over in order to handcuff him and effect an arrest. The rushed and erratic movements of Respondent were not those of a reasonable officer with Respondent’s level of training and experience.

At trial, Respondent sought to excuse his actions by claiming to have made certain observations to justify his use of force. Respondent claimed that his strikes to the arrestee’s legs were delivered in response to observing the arrestee holding onto Officer Delacruz’s collar. The video evidence, however, does not corroborate that any significant attention of the officers is directed towards a collar hold. Officer Delgado, on arrival, does not react in a manner that would indicate that Officer Delacruz is under distress. Rather, Officer Delgado has no difficulty controlling the arrestee’s right arm while Officer Delacruz focuses on the arrestee’s left arm. Even if a collar hold did occur, Respondent failed to articulate how his initial drop kick and strike with his radio in-hand were reasonably calculated to remove the arrestee’s hand from Officer Delacruz’s shirt collar.

Respondent also claimed that the force he deployed was reasonably necessary to gain the arrestee's compliance and effect an arrest; yet, Respondent's initial application of force was unlikely to assist his partners in achieving either goal. By the time Respondent arrived at the arrestee's side, the arrestee was already on his back with two officers focusing on the arrestee's arms and upper body, including one rather large officer. The next logical step was for Respondent to control the arrestee's legs and assist his partners in turning the arrestee over to be handcuffed. After Respondent's initial drop kick to the arrestee's right leg and hand strike with his radio in-hand to the arrestee's left leg, however, Respondent abandoned the arrestee's legs. This caused Officer Delgado to move to assume control of the arrestee's legs. Due to Respondent's rushed and erratic uses of force, he is depicted on video losing his balance, pushing Officer Delacruz in the back, and ejecting his Department radio into an active roadway. The preponderance of the evidence is that rather than deploying force in a disciplined and professional manner, Respondent deployed force in a haphazard manner with little regard for establishing situational awareness and evincing a primary concern for public safety.

A mere four seconds after the leg strike with his Department radio in-hand, Respondent re-positioned himself at the top of the arrestee's body and immediately began punching the arrestee. Respondent claimed that the five punches he delivered to the arrestee's face and upper body were reasonably necessary due to an observation he made of the arrestee attempting to push off the ground and stand up. Since at this point on the video the arrestee is not using his right arm or legs to attempt to stand, the only extremity left to assist in such an effort is the arrestee's left arm, which is off-camera. The actions of the other officers, however, as depicted on the video evidence, do not corroborate Respondent's claim that the arrestee is attempting to move off his back and stand up. Indeed, at this time, Officer Delgado disengages with the arrestee completely and Officer Delacruz moves from the arrestee's left side to the arrestee's right side. The Tribunal

also notes that at no time prior to Respondent initiating the punches did the officers make efforts to turn the arrestee over to handcuff him, nor did Respondent testify to any verbal warning delivered to the arrestee prior to resorting to the level of force Respondent deployed (*see, e.g., Disciplinary Case No. 2017-18154* [April 21, 2020] “[W]hile the video is not completely clear as to what [the suspect] was doing at the time [the 10-year Police Officer] swung at him...describing that [the suspect] was moving and twisting his body[] did not give the court sufficient grounds to conclude that throwing three punches at [the suspect’s] head was the reasonable use of force necessary in this situation to control [the suspect]. [The Police Officer] never testified that he tried to grab [the suspect’s] hands to help [his fellow officer] try to cuff him before he punched [the suspect]. He also never testified that he felt he had to punch [the suspect] to unlock his hands to place cuffs on them, as in situations where a suspect stiffens up and won’t release their hands from under their body.”)).

The Tribunal acknowledges that officer responses involving attempts to flee and resist arrest are often chaotic and dangerous circumstances. Here, the risks to Respondent and his partners were not insignificant. Due to the immediate nature of the response (upon arrival observing an unknown, fleeing suspect, causing officer to immediately give chase) the officers are unable to determine, in advance, the likelihood of dangerousness posed by the arrestee, including factors relevant to a determination of whether he is armed. Furthermore, at the time of the struggle, the officers were in the middle of an active roadway. Indeed, in isolation, each of Respondent’s strikes are of a variety of force that may be permitted where an officer is legally engaging with a suspect who is resisting arrest using their body (rather than a weapon) as a means of resistance and placing officer safety at risk. Taken together, however, Respondent’s use of force was gratuitous and extended beyond what a reasonable officer would employ under similar circumstances.

Accordingly, while some force was justified in response to the arrestee resisting arrest, the preponderance of the evidence supports the Department's position that, under the totality of the circumstances, the force used by Respondent was unreasonable.

For the foregoing reasons, I find Respondent Guilty of the sole specification charged.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history was also examined (*see* 38 RCNY 15-07). Information from Respondent's personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent was appointed to the Department on July 11, 2012, and he has no prior disciplinary history. Respondent has been found guilty of a use of force that was excessive and failed to meet the standards embodied in Patrol Guide Sections 221-01 and 221-02. The Department Advocate has recommended a forfeiture of ten (10) penalty days, which is the presumptive penalty under the Disciplinary Guidelines for the use of non-deadly excessive force against another resulting in no injury. The Tribunal finds, however, that the Disciplinary Guidelines counsels a mitigated penalty in this matter.

Among the mitigating factors accompanying excessive force penalties, the Disciplinary Guidelines consider: "Whether the subject engaged in active resistance." This mitigating factor accounts for the rapidly unfolding nature of responses involving active resistance, in which

officers must make split-second decisions under chaotic circumstances. It is undisputed here that the arrestee engaged in active resistance at the time of Respondent's response. Accordingly, in accordance with the Disciplinary Guidelines, I recommend a penalty of the forfeiture of five (5) penalty days. Since Respondent was suspended for one (1) day in connection with this matter, the penalty should consist of the forfeiture of one (1) pre-trial suspension day and the loss of four (4) vacation days.

Respectfully submitted,



Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED

00115 2021

DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER EDWIN DURAN
TAX REGISTRY NO. 952700
DISCIPLINARY CASE NO. 2019-21351

Respondent was appointed to the Department on July 11, 2012. On his three most recent annual performance evaluations, Respondent twice received overall ratings of “Exceptional” for 2017 and 2018, and received an overall rating of “Exceeds Expectations” for 2019. Respondent has been awarded four medals for Excellent Police Duty.

Respondent has no disciplinary record. In connection with the instant matter, Respondent was suspended on November 26, 2019, and then placed on modified assignment from November 27, 2019, to August 4, 2020. Respondent was also placed on Level I Discipline Monitoring on December 12, 2019; that monitoring remains ongoing.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials